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No. 72-1637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE MAGNAVOX COMPANY OF TENNESSEE AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 13-15)[1] is reported at 474 F.2d 1269. The decision

[1] The designation Pet. App. refers to an appendix to the petition for a writ of certiorari in this case.

and order of the National Labor Relations Board (Pet. App. C, pps. 18-49) are reported at 195 NLRB No. 40.

QUESTION PRESENTED

Whether a collective bargaining representative may lawfully waive the right guaranteed to employees by Section 7 of the National Labor Relations Act to distribute union literature during nonworking time in nonworking areas of the plant.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449), as amended, 29 U.S.C. 151, *et seq.*, are as follows:

Section 1.

* * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

Section 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and

shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

STATEMENT

Bargaining History

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called the IUE, was first certified in December 1954 or January 1955 as the collective bargaining representative of the Company's employees at its Greeneville, Tennessee, plants and warehouses, which are the only facilities here involved (A 12).[2] At all times since, the IUE has continued to be the representative of the Company's employees (A 11).

The "Plant Rules" which the Company introduced as its Exhibit 6 (A 6-7, 127), and which all parties

[2] The designation "A"— followed by a number refers to the Appendix printed in this Court.

stipulated "were and are in effect, during material periods herein" (A 6-7), admittedly contained neither an express nor implied limitation on distribution on Company property. Indeed, these plant rules (A 127) contain no mention of the subject of distribution on Company property.

The only written notice the Company ever gave its employees that they were not to distribute on Company property appeared in the 1953 Employee Handbook (A 13, 36, 130) which the Company admits was never in use after the IUE was certified in 1954 or 1955 (A 39). The purely historic character of this 1953 Employee Handbook appears from the following answers by the Company's witness, Byron D. Sites, Director of Industrial Relations for Magnavox Company, to questions by counsel for the Company (A 39):

> Q. When did you stop distributing this employees handbook?
>
> A. About the time the Union was certified.
>
> Q. As I understand your testimony then, since the time the Union has been certified, you have maintained an employee handbook in your Personnel Office, but you have not distributed this to your employees?
>
> A. We have maintained copies of this book. However, we have not distributed this book as a current employee handbook, no.
>
> Q. Is there another employee handbook?
>
> A. No, sir.
>
> Q. If an employee—have you hired any employees in the last year?
>
> A. Yes, sir.
>
> Q. Are these employees made aware of Respondent's Exhibit No. 1?
>
> A. No, sir, we have not distributed this since 1955.

Q. Can I assume that the Respondent's Exhibit No. 1 has remained dormant since 1955?
A. Exhibit No. 1 handbook, yes, sir.

No limitation on distribution appeared in the list of rules set forth in this 1953 Employee Handbook (A 44, 136). Page 24 of this 1953 Employee Handbook listed as Rule 6, a ban on solicitation in the plant during working hours, but no rule against distribution appeared (A 44, 136). The full list of rules as they appeared in this 1953 Employee Handbook is as follows (A 44, 136):

PLANT RULES

The man who said, "Rules are made to be broken," was obviously a rule breaker, or he wouldn't have made such an untrue statement. Rules are made to be followed and observed, not broken. They are usually made only after long study and often after some very sad experience.

Rules at Magnavox are few, fair, and reasonable. We are expected to follow them. Violation of the following may lead to disciplinary action and possible discharge.

1. Reporting to work intoxicated.
2. Bringing or using alcoholic beverages or drugs on Company Property or during working hours.
3. Fighting on Company Property.
4. Stealing—either from fellow employees or from the Company.
5. Refusal to do work assigned.
6. Soliciting of any kind on Company Property during working hours.

7. Gambling on Company Property.
8. Disregard of the starting and quitting signals for shifts and rest periods.
9. Willful destruction or defacing of Company Property.
10. Unexcused absence exceeding three days or persistent absenteeism.
11. Vulgar and/or profane language.
12. Poor quality of work or production or interfering with work of other employees.
13. Failure to report to Foreman any accident.
14. Countermanding instructions of supervisor.
15. Horseplay.
16. Disobeying safety regulations.
17. Punching another employee's time card.
18. Leaving Company Property during working hours without permission.
19. Intentionally reporting incorrect production.

Although the 1953 Employee Handbook has not been used for any purpose since 1955 (A 39), a separate sheet of paper containing exactly the rules as quoted above and as set forth in the 1953 Employee Handbook, has been posted in the plant continuously for the past 20 years (A 6-7, 44-45, 127). The Company did not produce any list of rules which mentioned distribution. The only written formulation of an alleged rule against distribution which the Company relies

upon appeared on page 18 of the 1953 Employee Handbook and reads as follows (A 13, 36, 44, 130):

> HANDBILLS
>
> You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property.

Except for the above quoted notice appearing in this 1953 Employee Handbook which had been out of use for 15 years before the instant controversy arose, the Company has neither suggested that any other written formulation of this notice existed nor produced any more recent rule or notice relating to distribution. At the hearing when asked to identify the Company rule against distribution, the Company pointed to page 18 of the 1953 Employee Handbook and to nothing else (A 12-13).

Company witnesses also admit that at no time during the negotiation of any contract was there any discussion of distribution, let alone any discussion of the IUE's waiving any rights to distribute on Company property. The Company's Director of Industrial Relations, Sites, who served as the Company's chief negotiator and was present at all negotiations from the time the IUE was certified to date (A 10-12, 46) testified on cross-examination by Mr. Rolnick, appearing for the General Counsel of the NLRB (A 38):

> Q. (By Mr. Rolnick) With regard to the negotiations preceding the signing of Respondent's Exhibit No. 6, was anything said during those negotiations by or about that by entering into Article XII, Section No. 1, or Article XII, Section No. 3, the Union was waiving its right to distribute literature on Company property?
>
> A. Specifically, no.

Q. Am I correct sir, that the contract does not contain any provision on prohibiting Union distribution on Company property?

A. Specific provision, no, it is not.

Q. Just to speed this up, in any negotiation, has there ever been —— has it ever been expressly mentioned by the parties that by entering into Article XII, Section Nos. 1 and 3, the Union was waiving its right to distribute literature on Company property?

A. No, only that the Company had the right to make rules.

Q. Referring to Respondent's—The context in Respondent's Exhibits 6 through 10, do any of those contracts contain an expressed provision that the Union was waiving its right to distribute literature on Company property?

A. No specific statement at that time.

The only provision in the collective bargaining agreement on which the Company relies as establishing the IUE's waiver of the right to distribute on Company property during non-working hours is the following (A 5-6, 125):

ARTICLE XII

* * * 3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement.

Except for the last clause "nor will they conflict with the terms of this agreement," the identically same provision appeared in the original collective bargaining contract negotiated between the Company and the IUE in 1955 (A 23, 36, 134). The last clause was added in 1956 (A 17, 25-26, 36, 132). With this last clause, this provision appeared without change in all subse-

quent collective bargaining agreements (A 26-30), including the agreement dated July 1, 1968, which was in effect at the time the unfair labor practices here involved occurred (A 5-6, 23, 135). As far as any witness recalled, there was no attempt to change, nor any discussion of this provision in any of the negotiations except the first occurring in 1955 (A 40).

The description by Company Witness Sites, testifying from his notes made at the time of the 1955 negotiations (A 16), which negotiations resulted in the inclusion of a provision in the agreement for the Company to make rules, is as follows (A 14-16):

> Q. (By Mr. McPherson) Would you state what that is please, what has been marked as Respondent's Exhibit No. 2?
>
> A. This is a copy of the proposal made by the Company to the Union, Article 12, Item General.
>
> Q. And does that—excuse me?
>
> A. This was the 1955 proposal for the initial contract.
>
> Q. Now, this is the first contract that's being negotiated between the parties, is that correct?
>
> A. Yes.
>
> Q. Now, on that proposal, is there a proposal concerning rules and regulations?
>
> A. Yes, sir, there is.
>
> Q. Would you state what that is, please?
>
> A. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on Plant property. These rules will not be of a discriminatory nature.
>
> Q. Now, was that provision accepted by the Union as stated there?
>
> A. No, sir.
>
> Q. Would you relate to us please what transpired concerning that paragraph?
>
> A. The Union first suggested a—.
>
> * * *

THE WITNESS: In the discussion of the rules, the question—the Union raised the question of, or the proposal of a negotiating of the rules and making them a part of the contract and the Company opposed this feeling it was not the best way to establish rules but rather that the Company should take this action, make the rules and the Union should have the right to protest if they felt they were discriminatory type rules. Then, they suggested, then they asked if we had intentions of making additional rules beyond what were in the Employee's Handbook which was in effect at that time, at which time they had a copy of it. At a subsequent meeting a few days later, we advised them we had no immediate plans for any change in the rules. However, by our proposal that we would still have the right to make the changes when circumstances dictated it. They then asked, said well, there might be rules which would be not perhaps discriminatory but unfair rules and so we in turn said that we had no objection to adding an unfair along with discriminatory, so that they also could on either basis, they could be protested by the Union if they disagreed with the rules that we put forth and on this basis, we reached an agreement approximately March 7th or 8th, I'm not sure which of those dates it happened on this particular clause.

The bulletin board privileges afforded the IUE are subject to censorship by the Company, which has contracted for the right to eliminate from posting anything "controversial" (A 125). The bulletin boards were proffered by the Company and there is no contention made that the discussion of the bulletin boards involved any reference to the Union's right to distribute. Company witness Sites described the bargaining history of the bulletin board provision in the agreement as follows (A 23-24):

Q. Now, during that first negotiation, was there also a proposal concerning Union bulletin boards?

A. Yes, sir.

Q. And, would you relate to us what occurred concerning that proposal during those negotiations?

A. The Company made a proposal that we provide bulletin boards for the exclusive use of the Union and there was a discussion of the Company's retaining the right to approve all such notices on or to go on the bulletin board. We added an understanding that such notices would be automatically approved unless they were of a controversial nature. This was done to meet the Union's objectives.

* * *

Q. (By Mr. McPherson) Was there an agreement finally reached on the bulletin board as you stated?

A. Yes, sir.

Q. And, it is included in the collective bargaining agreement?

A. Yes.

Q. What page is that shown on?

A. That is on page 33, Article 12, Section 1 on over onto page 34.

Q. That is Respondent's Exhibit No. 6 that you are referring to?

A. Yes.

The foregoing includes everything in the bargaining history upon which the Company relied to show that the IUE had waived its right to distribute on Company property.

The 1956 Request To Distribute

Only once since the IUE won the NLRB election conducted in December 1954 (A 12) has there been any organizational activity among the Company's employees at the facilities here involved.

The first collective bargaining contract between the Company and the IUE was for a term of one year, from May 1, 1955 to April 30, 1956 (A 17, 135). A decertification election was run on March 21, 1956 (A 18) and resulted in the retention by IUE of its certified status (A 11). Prior to this election the Company permitted employees who were opposed to union representation to distribute anti-union leaflets in the plant (A 18, 20, 36, 133). When IUE supporters attempted to distribute pro-IUE leaflets in Company parking lots, they were driven off of plant property by Company guards (A 20-21, 36, 133). Edward Lingo, representing the IUE, both phoned and wrote the Company protesting its failure to permit IUE supporters to distribute leaflets, and specifically requesting that "IUE members be allowed an opportunity to distribute handbills in the plant as has our opposition" (A 18, 36, 133). The Company then replied that it considered it "improper to permit this type of campaigning within the plant by either party and therefore must refuse your request to permit such distribution" (A 21, 36, 134).

Except for this incident, no issue respecting distribution by the IUE or its members of organizational material has arisen at any time since 1956 (A 33). There has never been any contention that the IUE's requests, followed by denials by the Company, in May 1970 and thereafter, which gave rise to this proceeding, that its members be allowed to distribute leaflets at the time clocks during non-working time, involved "organizational" activities. The hearing officer rejected as immaterial (A 34-35), and his ruling in this respect was affirmed by the Board (Pet. App. C, p. 18), the Company offer to prove "that there is no organiza-

tional activity at its facility represented by this Union, there is no organizational effort by any other Union at its facility, now apparently under way to decertify or oust this Union as a representative of the employees in the bargaining unit" (A 35).

Exceptions to the No-Distribution Rule

Throughout the years and continuing down to the present time, the Company has regularly distributed a variety of material to its employees in the plant including its plant newspaper (A 48-49, 56, 58, 74, 83, 191). Employee Bobby Kinery testified without contradiction that copies of the Company News Letter had been handed to him in the plant on the line as he was working (A 74).

The Company magazine "Magnavox" has sometimes been distributed to employees in the plant (A 49, 58, 73). Apparently in an attempt at creating an appearance of nondiscrimination, the Company has on occasion had the guard distribute the magazine to employees at the gate. However, the conditions under which the guard distributed in no way compared with the condition of cars rushing by four abreast with which the IUE distributors had to cope when they attempted distributions outside the plant gate (A 74-75, 82-83). The guard, on the days on which he handed out the Company magazine "Magnavox," moved the fence over so the cars could only exit one at a time and controlled traffic so he could hand a copy of "Magnavox" to each employee (A 73) instead of attempting to cope with the cars rushing by four abreast (A 74-75, 82-83).

The Company, also in an effort to establish the nondiscriminatory character of its refusal to allow the

IUE to make distributions on plant property, introduced testimony that the Company had many requests from merchants, politicians and civic organizations for permission to make distribution of leaflets or flyers on Company property but the Company had uniformly refused all such requests (A 42, 58). The Company, however, did pass out United Fund literature in the plant (A 91, 102).

The Company contends that the only exception which it ever made was the granting of permission to the IUE on one occasion to distribute in the plant literature describing a charity, known as the City of Hope, and the date upon which the union would have representatives present at the gate to receive contributions for the City of Hope (A 31-32, 55, 58).

Allegedly Relevant Contract Provisions

The only provisions in the collective bargaining agreement in effect at the time of the unfair labor practices here found, May and June 1970, upon which the Company relies, are the following (A 5-6, 125):

ARTICLE XII

General

1. The Company will provide one (1) bulletin board in Plant #1 (if bargaining unit employees are regularly assigned there), two (2) bulletin boards in Plant #2 and six (6) bulletin boards in Plant #3 which will be used exclusively for the posting of Union notices. Such notices must be approved by the Manager of Industrial Relations or his designated representative and will be placed on the board by the Personnel Department. It is understood that such notices will be automatically approved unless they are of a controversial nature.

These bulletin boards will be labeled "Local 796, IUE-AFL-CIO-CLC."

* * *

3. The Company will from time to time issue Rules and Regulations for the maintenance of orderly conditions on plant property. These rules will not be unfair or of a discriminatory nature, nor will they conflict with the terms of this agreement.

May and June 1970 Requests To Distribute

It was stipulated that on May 21, 1970 the Union requested permission from the Manager of Industrial Relations to distribute literature at the time clock and at a later date permission was denied (A 9). The request was made of Company officials by Richard Fisher, an IUE representative, during a grievance meeting (A 55). The Company took his request under advisement and the next day informed him that his request was denied (A 55). The oral request was then followed by a letter dated June 25, 1970 to the Company from counsel for the Union stating that it has been called to his attention that the Company is refusing to permit the Union to distribute Union literature on Company property and requesting the revocation by the Company of all rules forbidding solicitation or distribution on Company property, including the no solicitation rule which appears as Rule 6 in the set of Company promulgated rules (A 127, 136). In his letter to the Company, counsel for the IUE took the position that such rules were unlawful. He stated (A 3, 4, 121):

> It has been called to my attention by officers of IUE Local 796 that The Magnavox Company of Tennessee has adopted and/or enforced unlawful no-solicitation and no-distribution rules. This let-

> ter is to request that these rules be withdrawn immediately. Specifically, I request that Rule 6 of the plant rules be revoked immediately. In reference to no-solicitation, it is the position of the Union that employees should be allowed to solicit on nonwork time any place on Company property including work areas of the plant. It has also been called to my attention that the Employer is refusing to allow employees to distribute literature on Company property. It is the position of IUE that an employee should be allowed to distribute literature in nonwork areas of the Employer's property, including nonwork areas of the plant on the employee's own time.

By letter dated July 16, 1970, the Company replied, stating (A 4, 5, 122):

> As to solicitations, the Company does allow employees to solicit during non-work time in both non-work and work areas of the plant. As to distribution of literature, the Company by the collective bargaining agreement has the right to make rules and regulations. The only limitation to this right is that such rules will not be unfair or of a discriminatory nature. (Article XII, Paragraph 3, Page 59 of the Collective Bargaining Agreement) As part of this right, the Company formulated the no-solicitation rule which prohibits the distribution of literature on Company property. We feel this rule is neither unfair nor discriminatory in nature and that the Union as part of the collective bargaining process has waived its right to distribute literature on Company property. Further, by contract, a bulletin board is provided by the Company exclusively for posting union notices.

The Union thereafter filed the charges with the NLRB which instituted this proceeding (A 106).

The Problem of Access to the Company's Employees

The Company at the time of the hearing herein employed 2,300 employees in the bargaining unit represented by the IUE (A 57, 62-63). The number had been as large as 3,000 during the preceding year (A 60). This was a great increase in numbers over those employed at the time the Union organized and was certified (A 83). The employees lived scattered over a wide area in a two-state region (A 62-63, 93). The plant is located in Greeneville, Tennessee (A 11-12). Some of the workers live across the state line in Morrison, North Carolina (A 62). Others live in Johnson City, Tennessee, which is 30 miles distant from the plant (A 62).

All of the employees go to and from work by automobile (A 61). They park their cars on Company owned parking lots (A 7-8, 20, 128, 129). The Union has found it impossible to place leaflets in the hands of the employees as they drive to and from work because the cars go through the plant gates four abreast at such a rate of speed as to endanger the life of anyone venturing out between the lanes (A 72-75, 82-83, 95, 99-103). If a worker slows his car down to receive a leaflet, the traffic backs up (A 73-74, 87-88, 90, 101) and causes employees to be late to work which not only results in their pay being docked but also their personnel records being marked with a demerit which can be counted in assessing progressive discipline (A 60-61, 88).

The Company censors all material tendered by the Union for posting on the bulletin boards (A 58-59, 64-65, 94). Nor is the material which does get posted readily accessible to all employees. In the plants here involved there are only three bulletin boards, located

near the time clocks, where some 2,400 to 2,500 employees (including non-unit employees) who work on the first shift punch their time cards as they rush to and from the plant (A 57, 52-64). Obviously very few employees are reached directly by these bulletin boards. There are also two other bulletin boards in the warehouses, one in each warehouse, but only a small number of persons are employed in each warehouse (A 57.) Even though notices of Union meetings are posted on bulletin boards, often employees do not even hear of the notices and miss meetings because they did not know the meeting was being held (A 95).

The Union has tried mailing literature to employees at their homes (A 92). The Union cannot afford the expense of frequent mailings, and in addition, has difficulty in getting the employee's correct address so that many of the mailed-out notices are returned for lack of proper address (A 92-93).

The Union has always found it impossible to reach employees without the use of on-the-property distribution but had never raised the issue before because it believed it would have been useless (A 94). The issue was raised in May and June of 1970 because the Union had heard that a recent decision of this Court protected employees in the right to distribute literature on Company property (A 55, 94, 96-97).

The Board's Decision and Order

The Trial Examiner found (Pet. App. C, pp. 39-40), and the Board agreed (Pet. App. C, pp. 19-20), that the Company has for many years "maintained a rule prohibiting the distribution of literature on Respondent's parking lots and on other Company property" Pet. App. C, p. 19), that with respect to the need for

such a rule no "evidence of necessity whatsoever has been shown" (Pet. App. C, p. 40), that "this rule was presumptively invalid" (Pet. App. C, p. 39), and that, "as applied to employee distribution of organizational literature in nonworking areas on nonworking time, the rule was not justified by any extraordinary operational or disciplinary needs of Respondent" (Pet. App. C, p. 19).

The Trial Examiner found that the Union had never expressly waived its right to distribute on Company property but that the Union had acquiesced in the maintenance and enforcement by the Company of a ban on distribution on company parking lots or other Company property (Pet. App. C, pp. 41-42). The Board arrived at a "smiliar conclusion," expressly basing its conclusion on the fact that "(1) The contract terms expressly reserve to the Respondent broad rule-making powers; (2) the contract clauses currently describing the reserved management powers have appeared in all prior contracts of the parties over the 16-year period of their bargaining relationship; (3) the no-distribution rule, as now maintained, was in existence when the first contract between the parties was negotiated and has been in force continuously ever since; and (4) neither the Union nor the employees have heretofore challenged Respondent's right to maintain and enforce the rule, but rather have accepted and obeyed its terms" (Pet. App. C, pp. 19-20).

Both the Trial Examiner and the Board found that the Company had nevertheless violated Section 8(a)(1) of the Act by maintaining a rule which imposed a broader restriction on the rights of employees to distribute literature than is legally permissible, even where

the bargaining representative had waived its objections thereto (Pet. App. C, pp. 20-24, 43-44).

In the Trial Examiner's view the vice in the rule was that it would interfere with the employee's statutory rights of self-organization by barring employees from distributing organizational material in support of decertification of the IUE or in support of another union should they wish not to be further represented by the IUE (Pet. App. C, pp. 43-44). The Trial Examiner found (Pet. App. C, p. 44):

> To the extent, therefore, that the rule prohibits the employees from distributing literature, other than that of the Union, during nonworking time and in nonworking areas of Respondent's premises, it is invalid and violates Section 8(a)(1) of the Act.

In so finding the Trial Examiner followed and applied the principles first enunciated by the Board in *Gale Products,* 142 NLRB 1246 (1963), set aside *NLRB* v. *Gale Products,* 337 F.2d 390 (7th Cir. 1964).

At the request of the Company, the Board reexamined its *Gale Products* holding (Pet. App. C, pp. 20-21). The Board reaffirmed that portion of the *Gale Products* holding (142 NLRB at 1249) which appears in the following quotation (Pet. App. C, p. 21):

> The validity of a contractual waiver of employee rights must depend, however, upon whether the interference with employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver. Upon consideration of all the relevant factors, we are persuaded that, in the circumstances of this case, an unlimited contrac-

> tual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.

The Board, however, took note that the Fifth Circuit in *NLRB* v. *Mid-State Metal Products, Inc.*, 403 F.2d 702, 5th Cir. 1968), "earlier suggested" and the Eighth Circuit in *Machinists* v. *NLRB*, 415 F.2d 113 (8th Cir. 1969), held that the Board's *Gale Products* remedy was unfair because it "subjected employees who chose to support the contracting union to the prohibitions of the no-distribution rule while at the same time exempting dissident employees from such prohibition" (Pet. App. C, p. 23). The Board expressed its agreement with the Fifth and Eighth Circuits in this regard. The Board stated (Pet. App. C, p. 24):

> We believe the course mapped out for us by the decision of the Eighth Circuit in *Machinists* v. *N.L.R.B., supra,* and earlier suggested by the Fifth Circuit in *Mid-States Metal Products, supra,* best serves to effectuate the fundamental purposes of Section 7 of the Act and the rights it guarantees.
>
> We therefore feel it appropriate to modify the remedy announced in *Gale Products* and followed in related cases, insofar as that remedy prohibits employee distribution of literature by or on behalf of members of an incumbent labor organization which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other

matters related to the exercise by employees of their Section 7 rights.[9]

[9] As our holding is concerned solely with the exercise by *employees* of their Section 7 rights, it is not to be taken as licensing in any way the distribution of institutional—as distinguished from purely organizational—literature of a labor organization which has acquiesced in an employer's promulgation or maintenance of a broad no-distribution rule.

The Board entered an order requiring the Company to (Pet. App. C, p. 25):

> Cease and desist from maintaining, giving effect to, or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, or other matters related to the exercise by employees of their Section 7 rights.

The Decision of The Court Below

Each, the IUE and the Company, filed a petition for review in the United States Court of Appeals for the Sixth Circuit. The IUE challenged the substantiality of the evidence to support the Board's finding that the union had waived the right of the union and the employees to distribute literature on Company property. In denying the Union's petition for review the court below stated (Pet. App. A, p. 15):

> [O]n a less restricted review we might have found that the contract provision permitting the Company to issue rules and regulations did not waive the right to distribute literature even in the context of a preexisting no-distribution rule. Waiver of a right of such importance should be the subject of an express provision.

The court below, however, in response to the Company's petition for review, set aside the Board's Order, following in this respect the Sixth Circuit's holdings in *Armco Steel Corp* v. *NLRB,* 344 F.2d 621 (1965) and *General Motors Corporation* v. *NLRB,* 345 F.2d 516 (1965), in which that court had earlier disagreed with the Board's *Gale Products* decision (Pet. App. A, pp. 14-15). The court below stated (Pet. App. A, p. 15):

> We are not persuaded that our ruling in *Armco Steel* should be overturned at this time, and we adhere to the position that the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here.

SUMMARY OF ARGUMENT

I. The majority rule principle adopted by Section 9(a) of the National Labor Relations Act does not empower the employer and the Union to enter into a collective bargaining agreement which impairs or restricts to any substantial degree the employees' freedom to proselytize fellow employees with respect to changes in bargaining representatives or other concerted activities for mutual aid or protection. The power conferred by the National Labor Relations Act on the representative chosen by the majority to bind the minority, as this Court held in *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944), is like the power of a legislature and subject to the same "constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" (323 U.S. at 198). In considering the validity of a collectively bargained waiver of employee rights to distribute leaflets on Company owned park-

ing lots, and other non-work areas of employer property, the First Amendment freedoms therefore supply the measuring stick.

Just as, with respect to political democracy, a legislative body, no matter how unanimous or nearly unanimous its mandate at the polls, cannot destroy or substantially impair freedom of the press, so with respect to industrial democracy, the bargaining representative cannot destroy or substantially impair the right of employees to distribute leaflets to each other respecting matters related to self-organization or other concerted activities for mutual aid or protection. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945), this Court upheld the determination of the Board that the employer's parking lots were the uniquely appropriate place for distribution of leaflets by employees relating to their problems as employees. To empower a collective bargaining agent, by agreement with an employer, to destroy basic rights of freedom of communication between employees which are guaranteed protection against state intrusion by the First Amendment and against employer intrusion by the National Labor Relations Act, would have the effect of freezing in power the incumbents, a result in conflict with the basic premise of the National Labor Relations Act.

II. The right of employees in the instant case to communicate with each other by freely distributing leaflets on Company-owned parking lots or other non-work areas of Company property is essential to the effective exercise of Section 7 rights, in view of the location of the employer's property which makes distribution on public property an impossibility and in view of the widely distributed location of employee

homes. The record here establishes that no viable alternative exists, as the Board impliedly held when it determined that the employer's rule would be invalid except for the Union's alleged waiver.

III. There is no issue in this case with respect to the validity of a surrender of Section 7 rights in return for a *quid pro quo*. Admittedly no bargaining for a waiver ever took place and the waiver was solely based on acquiescence. However, the rights of communication between employees in the most appropriate place therefor are so basic to the operation of the system of collective bargaining that no surrender for a *quid pro quo* would be valid.

IV. The conceded validity of no-strike clauses affords no precedent. No-strike clauses have no effect on the right of employees to proselytize each other. The object of Congress to permit a stabilization of wages, hours and working conditions contemplated that in the exercise of collective bargaining power unions would establish grievance and arbitration machinery which would displace the right to strike for the term of the contract. The relationship of freedom of communication to the purposes of the Act negate any Congressional intent to grant unions and employers the power to entrench the incumbent union. Nor can such an intent by Congress be validly inferred for it would raise problems of constitutionality under the First Amendment.

V. A. no-distribution rule if valid and enforced literally would serve to entrench the incumbent bargaining representative, thereby destroying the Section 7 rights of employees.

VI. The Board properly held that the right of employees to distribute on Company property in favor

of a challenging union must carry with it the right of employees to distribute in favor of the incumbent union. Any other result is unfair and one sided.

ARGUMENT

I.

The power of the employer and the certified bargaining representative to establish wages, hours, terms and conditions of employment by collective bargaining agreement does not include the power to destroy or substantially to impair for the term of the agreement rights fundamental to self-organization and concerted activity for mutual aid and protection granted to employees by the National Labor Relations Act.

A. The constitutional limitations on state action provide the standard for delineating the collective bargaining powers.

In *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 198-199 (1944), this Court held that the provisions of the Railway Labor Act, 45 U.S.C 151, *et seq.*, which confer exclusive bargaining rights on the union selected by the majority, would be subject to grave constitutional issues as to their validity if these powers were not construed as subject to the same limitations as the Constitution imposes on Congress (323 U.S. at 198):

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative it is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate

> against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

In order not to be faced with this constitutional issue this Court held that the Railway Labor Act must be construed as imposing on the bargaining representative these constitutional limitations (323 U.S. at 202-205):

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, *cf. J. I. Case Co.* v. *N.L.R.B., supra,* 335, but it also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

Cf. *Elgin, J.&E. Ry.* v. *Burley,* 325 U.S. 711, 751-752 (1945), characterizing the majority rule provisions of the Railway Labor Act as an "instrument of government" but holding that the collective bargaining powers conferred on the employer and the union did not include the power to settle past grievances of employees unless so authorized by either a provision in the union constitution conferring this power or an authorization

from the employee in some other manner than merely the certification of the union.

This Court in a footnote to the opinion in the *Steele* case noted that Congress in adopting the National Labor Relations Act has expressly stated its intent to make the same majority rule principle as was adopted by the 1934 amendments to the Railway Labor Act applicable to all employers reached by the commerce power (323 U.S. at 202, fn. 3):

> Compare the House Committee Report on the N.L.R.A. (H.Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22) indicating that although the principle of majority rule "written into the statute books by Congress in the Railway Labor Act of 1934" was to be applicable to the bargaining unit under the N.L.R.A., the employer was required to give "equally advantageous terms to nonmembers of the labor organization negotiating the agreement." See also the Senate Committee Report on the N.L.R.A. to the same effect. S.Rep. No. 573, 74th Cong., 1st Sess., p. 13.

In subsequent cases this Court has held that the state action analogy enunciated in the *Steele* case is equally applicable to the majority rule provisions of the National Labor Relations Act, 29 U.S.C. 159 (a). *International Union, U.A.W.* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, 252 (1949); *American Communications Assn.* v. *Douds;* 339 U.S. 382, 401-402 (1950); *Radio Officers Union* v. *N.L.R.B.,* 347 U.S. 17, 47-48 (1954); *Syres* v. *Oil Workers International Union,* 350 U.S. 892 (1956); *Humphrey* v. *Moore,* 375 U.S. 335, 342 (1964); *Vaca* v. *Sipes,* 386 U.S. 171, 183 (1967); *N.L.R.B.* v. *Allis Chalmers Corp.,* 388 U.S. 175, 180 (1967).

The very same day that this Court announced its decision in the *Steele* case, this Court also decided a companion case under the National Labor Relations Act in which the same principles as governed in the *Steele* case were held applicable to the whole range of powers conferred by the majority rule principle adopted by Section 9(a) of the National Labor Relations Act, and not merely to problems of racial discrimination. *Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248, 255-256 (1944). Indeed, except for one case in which this Court summarily reversed without argument,[8] none of the numerous cases arising under the National Labor Relations Act in which this Court has cited and applied the principles of the *Steele* case have involved racial discrimination.

In *Wallace* and *Radio Officers,* the issue raised was similar to that present here in that the employer argued that employer conduct, which would constitute unfair labor practices but for the provisions of a collective bargaining agreement, had gained immunity through agreement of the certified bargaining representative. In both cases the agreement of the union, given by the union by its signature to the collective bargaining agreement, was held an invasion of fundamental rights conferred by the statute and hence ineffective to immunize employer violations. In *Wallace* this Court stated (323 U.S. at 255-256):

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing

[8] *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1956).

> their interests fairly and impartially. Otherwise employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.
>
> * * *
>
> We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers.

This Court has repeatedly cited the *Steele* and *Wallace* cases together in support of the state action analogy. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, 401-402 (1950), referring to *Steele* and *Wallace*, this Court stated (339 U.S. at pp. 401-402):

> The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-580 (1960), this Court characterized the collective bargaining relationship as "industrial self-government."

In *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 47-48 (1950), this Court similarly stated:

> We do hold that in the circumstances of this case, the Union being exclusive bargaining agent for

both member and nonmember employees, the employer could not, without violating § 8(a)(3) discriminate in wages solely on the basis of such nonmembership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless to make agreements more favorable to the majority than to the minority.[54] Such discriminating contracts are illegal and provide no defense to an action under § 8(a)(3).

[54] S. Rep. No. 573, 74th Cong., 1st Sess. 13. During a debate on the Act Senator Wagner stated 'under this proposed legislation, assuming an agreement has been consummated by the agency selected by the majority of the employees, there will be no advantage which a majority can have under an agreement, to which the minority is not also entitled.' 79 Cong. Rec. 7673.

While the discrimination between majority and minority in *Wallace* and *Radio Officers* related to jobs and rates of pay, there is even more reason to hold that the same limitations on restriction of freedom of speech and press which restrain state action by governmental agencies restrain limitations enforced by collective bargaining agreement on the exercise of the freedom to communicate effectively which Congress by Section 7 and 8(a)(1) granted to all employees, both those who voted for the majority union and those who voted against. Congress granted these rights as a means to obtain improvements in economic benefits. If it violates the Act to discriminate between minority and majority with respect to the benefits, as *Wallace* and *Radio Officers* hold, a fortiori it must violate the Act to discriminate with respect to the basic freedoms which make possible the other improvements.

In *N.L.R.B.* v. *Allis Chalmers Corp.*, 388 U.S. 175, 180 (1967), this Court expressly recognized that the state action analogy adopted in the *Steele* case was applicable to the National Labor Relations Act (388 U.S. at 180):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . .' *Steele* v. *Louisville & N. RR Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment,[3] and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term[4] and his right to refuse to cross a lawful picket line.[5] The employee may disagree with many of the union decisions but is bound by them. The majority rule concept is today unquestionably at the center of our federal labor policy.

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[3] See *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332; *Medo Photo Supply Corp.* v. *Labor Board*, 321 U.S. 678; *ILGWU* v. *Labor Board*, 366 U.S. 731, 737.

[4] See *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 280.

[5] *Labor Board* v. *Rockaway News Co.*, 345 U.S. 71.

The legislative history of the National Labor Relations Act supports the state action analogy. In explaining the intent of the language which now appears in Section 8(a)(1) of the National Labor Relations Act the Senate Report states (S. Rep. No. 1184 in S. 2926, 79th Cong. 2d Sess, reprinted 1 Leg. His. NLRA, p. 1103):

> The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.

B. The constitutional principles which forbid state action interfering with distribution of leaflets are applicable.

This Court has long held that state action which operates as a substantial restriction or impairment of the right to distribute leaflets violates the freedom of the press guarantee of the First Amendment. *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938); *Hague* v. *C.I.O.,* 307 U.S. 496, 501, 518 (1939); *Schneider* v. *State,* 308 U.S. 147, 162 (1939); *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943); *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946).

The "vital" role in the "maintenance of democratic institutions" of the right to distribute leaflets could hardly be stated in any stronger language than that repeatedly used by this Court. *Schneider* v. *State,* 308 U.S. at 151:

> This court has characterized the freedom of speech and that of the press as fundamental personal

rights and liberties. * * * It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. * * * Mere legislative preference * * * may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. (Footnote omitted)

Marsh v. *Alabama,* 326 U.S. at 509:

As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men".

Lovell v. *Griffin,* 303 U.S. at 542:

The liberty of press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Martin v. *Struthers,* 319 U.S. at 146-147:

Freedom to distribute information * * * is so clearly vital to the preservation of a free society * * * it must be fully preserved.

Roth v. *United States,* 354 U.S. 476, 484, 488 (1957):

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

* * *

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. (footnotes omitted)

New York Times v. *Sullivan,* 376 U.S. 254, 269 (1964):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 467, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California,* 283 U.S 359, 369.

And quoting from Jefferson in *Martin* v. *Struthers,* 319 U.S. at 143, fn. 3:

> The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure." Jefferson to Lafayette, *Writings of Thomas Jefferson,* Washington Ed., v. 7, p. 235.

There is no crescendo in the praise by this Court for the efficacy of the right of free press to our historic freedoms. The lanuage has always been in the superlative. But the places in which the exercise of this right must be privileged has shown a steady expansion. In *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516, this Court held that public streets and parks were appropriate places in which to exercise First Amendment rights. This Court stated (307 U.S. at 515):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

In *Marsh* v. *Alabama*, 326 U.S. 501, 507-509, it was the privately owned streets of a company town which were held appropriate places in which religious literature might be distributed. This Court state (326 U.S. at 508-509):

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First Amendments than there is for curtailing these freedoms with respect to any other citizen. (footnotes omitted)

This Court there balanced the property rights of the owners of the company town with the First Amendment rights of its inhabitants and concluded that the property rights were entitled to very little weight (326 U.S. at 509):

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. (footnote omitted)

In *Martin* v. *City of Struthers,* 319 U.S. 141, the distributors of religious leaflets, without prior invitation, went on the private property of home owners and knocked on their doors, offering literature free. This Court there held the place where distribution took place was immaterial to the protection of the First Amendment (319 U.S. at 146-147):

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.

In *Staub* v. *City of Baxley,* 355 U.S. 313, 322, fn. 5 (1958), this Court stated that the First Amendment right there, which the State attempted to regulate by requiring a permit, involved only the exercise by the union of these rights in the homes of employees.

In three of the cases in which this Court has invalidated state action as unconstitutional infringement on First Amendment rights, the rights of free speech, free press and free assembly were invoked in aid of the activities of employees for self-organization and other

concerted activities for mutual aid and protection. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). This Court held that the same rights of self-organization and mutual aid which Congress protected against employer invasion by its enactment of the National Labor Relations Act, were protected by the First and Fourteenth Amendments from invasion by action of states and municipalities.

In the subsequent decision of *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 460-461 (1958), this Court stated the principle which is derived from all the foregoing cases as follows (357 U.S. at pp. 460-461):

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge* v. *Oregon*, 299 U.S. 353, 364; *Thomas* v. *Collins*, 323 U.S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow* v. *New York*, 268 U.S. 652, 666, *Palko* v. *Connecticut*, 302 U.S. 319, 324; *Staub* v. *City of Baxley*, 355 U.S 313, 321; *Cantwell* v. *Connecticut*, 310 U.S. 296, 303. Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom is subject to the closest scrutiny.

The right of employees to distribute union literature or leaflets on employer-owned parking lots was first

brought before this Court in *N.L.R.B.* v. *LeTourneau Co.*, 324 U.S. 793 (1945), decided together with *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). Since only one opinion was issued in the two cases, and they are generally known as the *Republic Aviation* case, hereinafter this decision will be designated as the *Republic Aviation* case. This Court in the *Republic Aviation* case agreed with the N.L.R.B. that the employer interfered with rights guaranteed employees by Section 7 of the National Labor Relations Act by maintaining a rule forbidding distribution of literature on company property. The opinion of this Court in *Republic Aviation* took no cognizance of the fact that the statutory rights of employees to communicate freely without employer interference paralleled their First Amendment rights and its only reference to constitutional rights was the quotation of language from the Second Circuit in which the employer's property rights, though protected by the Fifth Amendment, are held in balance subordinate to the statutory right of the employees. The reference to the Fifth Amendment appears in the following context (324 U.S. at 803):

> In the *LeTourneau Company* case the discussion of the reasons underlying the findings was much more extended. 54 NLRB 1253, 1258, *et seq.* We insert in the note below a quotation which shows the character of the Board's opinion.[8]

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[8] 54 NLRB at 1259-1260: "As the Circuit Court of Appeals for the Second Circuit has held, 'It is not every interference with property rights that is within the Fifth Amendment and inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' The Board has frequently applied this principle in decisions involving varying sets of circumstances, where it has held that the employer's right to control his property does not permit him to deny access to his property to persons

In a subsequent case this Court indicated a recognition of the fact that statutory rights involved in the *Republic Aviation* case paralleled constitutional rights and served the same function in industrial democracy as the First Amendment rights serve in political democracy. In *Marsh* v. *Alabama,* 326 U.S. 501, 506, this Court cited *Republic Aviation* as follows:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. *Cf. Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 793, 65 S.Ct. 982, 985, 987, note 8, 157 A.L.R. 1081.

In opinions of Justices of this Court *Republic Aviation* has repeatedly been cited as holding that an employer no-distribution rule "has no inferable legitimate business purpose," *N.L.R.B.* v. *Great Dane Trailers, Inc.,* 388 U.S. 26, 35 (1967), Mr. Justice Harlan, dissenting; "no significant employer justification," *American Ship Building Co.* v. *N.L.R.B.,* 380 U.S. 300, 339 (1965), Mr. Justice Goldberg, concurring. Cf. *Textile Workers* v. *Darlington Mfg. Co.,* 380 U.S. 263, 268-269

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whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining, and in those decisions which have reached the courts, the Board's position has been sustained. Similarly, the Board has held that, while it was 'within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,' it was 'not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,' the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization."

(1965); *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 680 (1961).

On the employee side of the scales the Section 7 rights are as essential to the workability of the collective bargaining structure which Congress sought to protect as First Amendment rights are to political democracy. As stated in the Senate Report on Violations of Free Speech and Rights of Labor (S.Rep. No. 1150, 77th Cong., 2d Sess, Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

Section 7 guarantees are statutory replicas of First Amendment rights. They impose on employers the same restrictions as the Constitution imposes on state action.

In the instant case the Trial Examiner found (Pet. App. C, p. 39) and the Board affirmed his finding (Pet. App. C, p. 19) that the Company's rule against distribution is presumptively invalid under the Board's well established standards for judging such rules. These standards are set forth in *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962), and as applicable to this case are as follows):

> * * * the no-distribution rule maintained by the Respondent is presumptively invalid on its face, as applied to employees who may wish to dis-

> tribute union literature, since its reach is not limited to working time or to the working areas of the plant. We also find that the presumption of invalidity is not overcome by the testimony of Carson Butcher, Respondent's vice president, that the rule was adopted years ago for the purpose of "keeping down the litter * * * and fire hazards * * * in the plant." The mere assertion that a broad no-distribution rule has this purpose hardly proves that it is actually "necessary" for the employer to prohibit union handbilling for his own employees in nonworking areas in order to "maintain production or discipline" (*Babcock & Wilcox, supra*). Such necessity is not shown here.

After quoting the foregoing, the Trial Examiner commented that "in the instant case, no evidence of necessity whatsoever has been shown." (Pet. App. C, p. 40). The Board in affirming added "that, as applied to employee distribution of organizational literature in nonworking areas on nonworking time, the rule was not justified by any extraordinary operational or disciplinary needs" of the Company (Pet. App. C, p. 19).

Thus the employees would be entitled to freely communicate by distributing leaflets on the parking lots and other non-work areas of the Company's property were it not for the historical acquiescence of the Union in this employer rule. The record establishes that this acquiescence was based either on ignorance that the Company claimed to have such a rule or unawareness that such a rule was illegal or both (A 55, 94, 96-97).

The Board having found that the Union must be deemed to have waived this rule and that the waiver is to be treated as a provision in the collective bargaining agreement that the Company may have this rule (Pet.

App. C, pp. 19-24) and the Union not having petitioned for certiorari, is here bound by this finding. Hence, the Union must argue this case as if the Union had agreed with the Company that even though this Company had no reason for this rule, the Company could bar distribution by any employee of any literature on Company property. The validity of such an arrangement between union and employer then must be judged by the power of union and employer to enter into such an agreement. Applying the political analogy principle of the *Steele* case, the validity of the Company's rule is to be judged by the same standards as if a state or municipality had forbidden the leafletting. Under the principle of *Lovell* v. *Griffin* and *Martin* v. *City of Struthers,* the state or municipality could not make such a rule. It follows that the employer and the union, having shown no interest justifying the restriction, cannot validly so agree.

Law review commentators are generally in accord that the right to solicit memberships and the right to distribute union literature "are too closely related to the Act's essence, the spread of collective bargaining, to permit a legally effective waiver." William B. Gould, *The Question of Union Activity on Company Property,* 18 Vanderbilt Law Rev. 78, 145 (December 1964). To the same effect, *Collectively Bargained Waiver of Plant-Site Solicitation and Distribution,* 56 Iowa Law Rev. 152 (October 1960); William B. Gould, *Union Organizational Rights and the Concept of 'Quasi-Public' Property,* 49 Minn. L.Rev. 505, 513 (January 1965); *Labor Law—Collective Bargaining—Employer May Not Enforce Collective Bargaining Provision Embodying Union Waiver of Employee's Right to Solicit Against That Union,* 22 Vanderbilt Law Rev.

664 (April 1969); *Labor Law—Solicitation and Distribution—Collective Bargaining Proviso Prohibiting Employee Solicitation and Distribution on Company Premises During Non-Working Time and in Non-Working Areas Constitutes a Violation of Section 8 (a)(1),* 14 Villanova Law Rev. 522,557 (Spring 1969); Dennis P. Work, *Solicitation Waiver in Collective Bargaining Agreement Held Invalid,* 16 Stan. Law Rev. 456 (March 1964).

II.

The location of the Company's plant and the widely dispersed location of employee homes make distribution on Company property essential to the effective exercise of Section 7 rights.

The Company has so located its plant that employees cannot stand at a plant gate and hand out leaflets to fellow employees walking in or out. Employees all drive to and from work (A 61). The plant gates allow cars to enter or exit four abreast at fast speeds (A 72-75, 82-83, 95, 99-103). "The task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were" employees able to pass them directly to the intended recipient. *Amalgamated Food Store Employees Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 322 (1968). Cf. *Standard Oil Co. of California* v. *N.L.R.B.,* 399 F.2d 639, 640 (9th Cir. 1968). When workers slow down to receive a leaflet, traffic backs up (A 73-74, 87-88, 90, 101). Employees who are late to work not only get their pay docked but may accumulate demerits which count with others in assessing progressive discipline (A 60-61, 88).

There are some 2300 employees in the bargaining unit who live scattered over a two state area covering

more than one hundred square miles. The plant is located in Greeneville, Tennessee (A 11-12). Some workers live in Johnson City, Tennessee, 30 miles distant from the plant, and others live in Morrison, North Carolina (A 62). Reaching employees by mail is expensive and address lists are often inaccurate (A 92-93).

The record here depicts workers rushing by car to work, rushing home again (A 60-61, 73-74, 87-88, 90, 101). The Company employee conforms in these respects to the average worker described in a recent study by Sebastian de Grazia, *Of Time, Work & Leisure* (20th Century Fund 1962). Consideration of the realities of communication between union and employees and of employees *inter se* which are crucial to the effective exercise of Section 7 rights requires an understanding of the rush nature of the worker's life. De Grazia summarizes his finding as follows:

> * * * the average American male who works full time—that is, at least 35 hours a week * * * works nearly 48 hours a week.[4]
>
> Never before have so many Americans had so little time to call their own.[5]
>
> The rule of thumb reckons that men spend 10 to 20 percent of their working life going back and forth between home and work.[6]

The surveys of modern living measure the time spent by the average worker in do-it-yourself activities required to keep his home, his car, and his other be-

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[4] Sebastian de Grazia, *Of Time, Work & Leisure* (20th Century Fund 1962), p. 70.

[5] *Ibid.*

[6] *Id.*, at pp. 72-73

longings in shape as in effect a form of moonlighting compelled by present day living standards. In showing how these activities cut into the supposedly free time of the present day industrial employee, de Grazia states:

"Many of the moonlighting jobs are in the category of service trades—T.V. and radio fixing, house painting and restoring, kitchen appliance repairs, carpeting, etc. Those services are relatively expensive because of the high proportion of skilled labor they require. For many persons short of money, there seems to be two ways of handling these jobs; either leave home to become a beachcomber or do them yourself. The only safe course seems to be do-it-yourself. Yet the working man home from work is entitled to his rest. Presumably he should not be called upon to do other work, unpaid though it be.

"* * * classifying them as free time simply because they are unpaid would pass only the sleepyheads of an inefficient accounting system.

"* * * doing it oneself becomes a way of paying for the house by working longer hours. In many cases, too, the term should be 'unfinished home owner'. The new house when bought is incomplete, to reduce costs, and work must be done to building the carport, finish the attic or basement. When old homes are bought, it is the renovating that calls for home work.

"The bulk of the do-it-yourself market falls in the category of structural home improvements, home painting and wall papering, furniture making and furnishing, slip-covering, home gardening and ground maintenance, home dressmaking and sewing * * *

"Do-it-yourself work also extends to other parts of life—to shopping, for example. The customer

has to learn how the supermarkets classify produce, meat, dairy products, groceries and so forth —and then not only find the desired goods but sort them out properly for the checker who used to wait on customer but now merely corrects his sorting. * * * call it self-service or do-the-work-yourself, it all takes a lot more time and effort than having the grocer wait on you or the grocer's boy deliver your order as a result of a note or call. A similar system governs the sorting for collection of garbage and trash; it has become a do-it-yourself activity.

"* * * men put in on the average nearly five (4.8) hours a week in miscellaneous work (not hobbies) around the house.[7]

"Work time, if we use the calculations made earlier take up an average of ten hours and forty minutes a day (job about eight hours, journey to work one and a half hours, sphere of woman's work in housekeeping allocated for man, about 20 minutes, do-it-yourself work, about forty minutes, moonlighting, ten minutes), subsistence time takes up an average of ten and a half hours (sleep eight and a half, dressing, eating, cooking and shopping nearly two hours) (Table 3). For all the rest, including prayers, getting the car fixed, going to barber, dentist, shoemaker or laundry—items which are usually overlooked—we can make a low guess of twenty minutes per day * * *. If, in order to give the worker the benefit of the weekend, we calculate on the basis of a five day week, we shall have to say the job alone takes an average of nearly nine and a half hours a day. On work days he would have not two and a half hours of time free but only about one hour.[8]

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[7] *Id.*, at pp. 75-77.

[8] *Id.*, at p. 96.

Because he has so very little free time and because he is usually satisfied with the way his union is run, most industrial workers do not attend union meetings except on the occasion of a meeting called to consider a new contract or to conduct a strike vote.[9]

For these reasons the union meeting is not available as a place where the union or other employees can, as a practical matter, expect to communicate with other workers. It, of course, is not a likely place for a new union, attempting to unseat the incumbent, to reach employees.

House to house canvassing over as wide an area as would be necessary to reach all of the Company's employees, even assuming they would be home when the visitor called, would be so expensive and time consuming as not to afford any real alternative avenue of communication.

Bulletin boards are censored by the employer and available only for the non-controversial (A 58, 59, 64-65, 94-95). With 2300 employees, rushing in and out before and after work, bulletin boards have proved ineffective even as a means of notifying all employees of times and places for union meetings (A 57, 62-64, 95). No substantial number of employees could stand and read any leaflet posted on a bulletin board. And, again, bulletin boards are not available to either em-

[9] Beverly Gilmer, *Industrial Psychology* (McGraw-Hill, 1961), p. 232, states: "There are typical large membership turnouts at meetings called to consider a new contract or to conduct a strike vote, but extremely small attendance at all other times. This should not be taken as a sign of indifference to the organization but rather as an indication that the union is perceived as performing a particular function for its members, and that as long as there is general satisfaction with the results the members have little reason to participate in its affairs."

ployees as distinguished from union or to a non-incumbent union. If employees were free to distribute on company property, leaflets could be placed on cars in parking lots or handed out at the time clocks, thus affording a cheap easy way of reaching all employees.

The Company's no-solicitation rule hence constitutes, to all intents and purposes, a denial of the right to distribute literature on Company property. The absence of any showing that the Company has any need for such a rule (Pet. App. C, pp. 19, 40), presents the Company's denial as a particularly arbitrary interference with Section 7 rights.

The National Labor Relations Board in the *Republic Aviation* case, in language quoted by this Court (324 U.S. 793, 801, n. 6), held that "in the plant on their own time" was "the very time and place uniquely appropriate and almost solely available to" employees for the exercise of Section 7 rights. The opinion in *Republic Aviation* expressly mentioned that in neither the Republic Aviation plant nor the Le Tourneau plant were there "any unusual conditions existing in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment." (324 U.S. at 801). This Court thereby implicitly rejected the argument that only where unusual conditions exist is the employer required to permit his property to be used as the locus for distribution of union literature. Nevertheless, we believe it relevant in this case to emphasize the absence of reasonable alternative means of reaching employees.

The absence of alternatives means that the Sixth Circuit's setting aside of the Board order amounted to a holding that the majority rule principle conferred

on the employer and the union the power to destroy for the term of the collective bargaining agreement the only effective method of communication which exists between employees *inter se* and the union and employees. If employees should desire to form or join another union during the term of this contract the only appropriate place in which to hand out leaflets is barred to them.

For the majority in any political election to pass a law barring distribution of literature in parks, streets, or at the doors of citizens, thereby impairing substantially the ability of the minority to organize in an attempt to become a majority, would violate the First Amendment. We believe that the National Labor Relations Act must be construed as not authorizing the union and the employer by collective bargaining agreement to deprive employees of their Section 7 right to distribute union literature on Company property.

III.

The receipt of a quid pro quo from the employer in return for waiving the right of employees to distribute on company property, if such quid pro quo could be inferred from, at most, acquiesced in an employer anti-distribution rule, does not serve to empower the union to bargain away Section 7 rights of employees.

The court below in setting aside the Board's order adhered to its ruling in *Armco Steel Corp.* v. *N.L.R.B.*, 344 F.2d 625 (6th Cir. 1965). In that case, as one ground for refusing to enforce the Board's order, the Sixth Circuit presumed that "the union obtained from Armco a *quid pro quo* for its assent to the clause" and that the "parties to a contract cannot be restored to

their *status quo* when a clause is deleted from their contract without mutual consent" (344 F.2d at 625). In the instant case, where admittedly the parties did not negotiate with respect to the Union's waiving of the invalidity of any non-distribution rule (A 38-40) there was obviously no *quid pro quo* and no inability to restore the *status quo.*

In situations in which there is an actual *quid pro quo* for the union's waiver of the rights of employees, we would urge that the waiver was nonetheless beyond the collective bargaining powers of the bargaining representative and the employer. Rights of communication guaranteed by Section 7 are rights of employees which cannot be put up for sale by the bargaining representative. Just as First Amendment rights preserve political democracy, so the rights of communication guaranteed by Section 7 are essential to preserve free collective bargaining.

If an employer may buy from the incumbent union the right to suppress effective communication among its employees for the term of the contract, the antithesis of the industrial democracy contemplated by Congress results. The employees are deprived of the right to circulate written communications amongst their fellow workers in an effort to improve conditions, change officers or change unions. Convenient although the employer and incumbent union or incumbent officers of the incumbent union may find such an arrangement, it frustrates the rights which Congress believed workers should enjoy in order to achieve the objective of bargaining through freely chosen collective bargaining representatives.

IV.

This Court's approval of no-strike clauses affords no precedent for no-distribution clauses.

This Court in holding that a union may lawfully bargain collectively for a no-strike clause for the duration of a collective bargaining agreement, was careful to except from permissible waivers any which might interfere with the free selection of a collective bargaining representative. Thus, in *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 280 (1956), this Court stated:

> On the premise of fair representation, collective bargaining contracts frequently have included certain waivers of the employees' right to strike and of the employer's right to lockout to enforce their respective economic demands during the term of those contracts. Provided the selection of the bargaining representative remains free, such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees. (footnote omitted)

The Fifth Circuit in *N.L.R.B.* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702, 705 (5th Cir. 1968), distinguished the right to distribute literature from the right to strike in that the first related to their right to select a bargaining agent whereas the latter went merely to the pursuit of an economic advantage. The court stated (403 F.2d at 705):

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees

acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage.

* * *

* * * [T]he rationale of allowing waiver by the union disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative.

Similarly see *Collectively Bargained Waiver of Plant-Site Solicitation and Distribution,* 56 Iowa Law Rev. 152, 168-169 (October 1970).

We do not believe that a no-strike clause should properly be labeled as a "waiver." The word "waiver" assumes that but for the waiver the right would exist. This Court has held that the right to strike does not exist during the term of a collective bargaining agreement which provides for resolution of grievance by arbitration, even where there was no waiver of the right to strike and the collective bargaining agreement did not contain an express no-strike clause. *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95 (1962). This result was reached by recognizing that Congress viewed the stability of a collective bargaining agreement for a specified reasonable period of time, which it was the object of Congress to achieve, as the alternative to strikes. This Court has held that Congress

had as its object eliminating strikes during the period for which the parties were able to agree on terms and conditions of employment. Cf. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237 (1938).

With respect to the right of communication between employees which Congress protected by Sections 7 and 8(a)(1), just the opposite is true. The exercise of these rights is consistent with the stabilization of relationships during the term of the collective bargaining agreement. Indeed, suppression of free expression of ideas between employees will tend to disrupt rather than stabilize. To paraphrase the language used by Mr. Justice Brandeis in his concurrring opinion in *Whitney* v. *California*, 274 U.S. 357, 375-376 (1927), which this Court quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) as the classic formulation of the dangers of suppressing communication:

> [I]t is hazardous to discourage thought, hope and imagination; * * * fear breeds repression, * * * repression breeds hate; * * * hate menaces stable [employment relations]; * * * the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.

V.

A no-distribution rule if valid and enforced literally would serve to entrench the incumbent bargaining representative, thereby destroying the Section 7 rights of employees.

The executing by an incumbent union of a collective bargaining agreement containing a prohibition against distribution by employees on company property on analysis amounts to a usurpation by the majority in an effort to preserve itself in power indefinitely. The

Board in its original *Gale Products* decision, 142 N.L.R.B. 1246, 1249 (1963) characterized such an agreement as an attempt by the incumbent union "to freeze out another union by treading on statutory rights of employees to engage in protected activities." The Fifth and Eighth Circuits have agreed with the Board that the incumbent union and the employer may not lawfully ban distribution on company property in support of another union. *N.L.R.B.* v. *Mid-States Metal Products Inc.*, 403 F.2d 702, 706 (5th Cir. 1968); *Machinists* v. *N.L.R.B.*, 415 F.2d 113, 116 (8th Cir. 1969).

We submit that the no-distribution rule negotiated by an incumbent union constitutes prohibited discrimination in favor of the majority and by adopting such a rule the employer violates Section 8(a)(1) as the Board here held (Pet. App. C, pp. 20-21).

VI.

The Board properly held that the right of employees to distribute on company property in favor of a challenging union must carry with it the right to employees to distribute in favor of the incumbent union.

In *Machinists* v. *N.L.R.B.*, 415 F.2d 113, 116 (8th Cir. 1969), the Eighth Circuit agreed with the Board that the union and the employer had no power to agree on a no-distribution rule which would prohibit employees from distributing literature in support of a challenging union. But the Eighth Circuit held that the right of employees to distribute literature directed at changing representatives must be accompanied by the right of employees who opposed a change to distribute literature in support of the incumbent. The Board

in the instant case agreed that the Eighth Circuit had correctly construed the statute and accordingly ordered the Company to withdraw its rule barring distribution either in favor of or opposed to changing bargaining representatives or other matters related to the exercise by employees of their Section 7 rights. We submit that any other rule is one sided and unfair.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should reverse the judgment below and remand with directions to enforce the order of the Board.

Respectfully submitted,

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